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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 CINDY U'REN,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Commissioner of
10 Social Security,¹

11 Defendant.

Case No. 3:13-cv-05585-RJB-KLS

REPORT AND RECOMMENDATION

Noted for August 1, 2014

12 Plaintiff has brought this matter for judicial review of defendant's denial of her
13 application for disability insurance benefits. This matter has been referred to the undersigned
14 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as
15 authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing
16 the parties' briefs and the remaining record, the undersigned submits the following Report and
17 Recommendation for the Court's review, recommending that for the reasons set forth below,
18 defendant's decision to deny benefits should be reversed and this matter should be remanded for
19 further proceedings.

20 FACTUAL AND PROCEDURAL HISTORY

21 On May 3, 2010, plaintiff filed an application for disability insurance benefits, alleging
22 disability as of October 5, 2005, due to migraine headaches, insomnia, and fibromyalgia. See

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26 ¹ On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of the Social Security
Administration. Therefore, under Federal Rule of Civil Procedure 25(d)(1), Carolyn W. Colvin is substituted for
Commissioner Michael J. Astrue as the Defendant in this suit. **The Clerk of Court is directed to update the
docket accordingly.**

1 Administrative Record (“AR”) 155-56, 169. The application was denied upon initial
2 administrative review and on reconsideration. See AR 102-04, 112-16. A hearing was held
3 before an administrative law judge (“ALJ”) on January 26, 2012, at which plaintiff, represented
4 by counsel, appeared and testified, as did vocational expert, Jenipher Gaffney. See AR 45-96.

5 On February 10, 2012, the ALJ issued a decision in which plaintiff was determined to be
6 not disabled. See AR 7-26. Plaintiff’s request for review of the ALJ’s decision was denied by
7 the Appeals Council on May 17, 2013, making the ALJ’s decision defendant’s final decision.
8 See AR 1-4; see also 20 C.F.R. § 404.981, § 416.1481. On July 18, 2013, plaintiff filed a
9 complaint in this Court seeking judicial review of the ALJ’s decision. See Dkt. #1. The
10 administrative record was filed with the Court on December 20, 2013. See Dkt. #9. The parties
11 have completed their briefing, and thus this matter is now ripe for judicial review and a decision
12 by the Court.

14 Plaintiff argues the ALJ’s decision should be reversed and remanded to defendant for
15 further proceedings, because the ALJ erred: (1) in evaluating the medical evidence in the record;
16 (2) in discounting plaintiff’s credibility; (3) in failing to obtain medical expert testimony; (4) in
17 assessing plaintiff’s residual functional capacity; (5) in finding her to be capable of returning to
18 her past relevant work; and (6) in finding her to be capable of performing other jobs existing in
19 significant numbers in the national economy. The undersigned agrees the ALJ erred in
20 determining plaintiff to be not disabled, but, for the reasons set forth below, recommends that
21 while defendant’s decision should be reversed, this matter should be remanded for further
22 administrative proceedings.

25 DISCUSSION

26 The determination of the Commissioner of Social Security (the “Commissioner”) that a

1 claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been
 2 applied by the Commissioner, and the “substantial evidence in the record as a whole supports”
 3 that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v.
 4 Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan,
 5 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will,
 6 nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence
 7 and making the decision.”) (citing Brawner v. Secretary of Health and Human Services, 839 F.2d
 8 432, 433 (9th Cir. 1987)).

10 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
 11 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation
 12 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
 13 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
 14 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
 15 by more than a scintilla of evidence, although less than a preponderance of the evidence is
 16 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
 17 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
 18 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
 19 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
 20 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).²

23 ² As the Ninth Circuit has further explained:

24 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
 25 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
 26 substantial evidence, the courts are required to accept them. It is the function of the
 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may
 not try the case de novo, neither may it abdicate its traditional function of review. It must
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are
 rational. If they are . . . they must be upheld.

1 I. The ALJ's Evaluation of the Medical Evidence in the Record

2 The ALJ is responsible for determining credibility and resolving ambiguities and
3 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).
4 Where the medical evidence in the record is not conclusive, “questions of credibility and
5 resolution of conflicts” are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,
6 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion must be upheld.” Morgan v.
7 Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining
8 whether inconsistencies in the medical evidence “are material (or are in fact inconsistencies at
9 all) and whether certain factors are relevant to discount” the opinions of medical experts “falls
10 within this responsibility.” Id. at 603.

12 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings
13 “must be supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ can do this
14 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
15 stating his interpretation thereof, and making findings.” Id. The ALJ also may draw inferences
16 “logically flowing from the evidence.” Sample, 694 F.2d at 642. Further, the Court itself may
17 draw “specific and legitimate inferences from the ALJ’s opinion.” Magallanes v. Bowen, 881
18 F.2d 747, 755, (9th Cir. 1989).

20 Pursuant to the relevant federal regulations, in addition to “acceptable medical sources,”
21 that is, sources “who can provide evidence to establish an impairment,” 20 C.F.R. § 404.1513
22 (a), there are “other sources” such as nurse practitioners, therapists and chiropractors, who are
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Sorenson, 514 F.2dat 1119 n.10.

1 considered other medical sources³, see 20 C.F.R. § 404.1513 (d). See also Turner v. Comm'r of
 2 Soc. Sec., 613 F.3d 1217, 1223-24 (9th Cir. 2010) (citing 20 C.F.R. § 404.1513(a), (d)); Social
 3 Security Ruling “SSR” 06-3p, 2006 SSR LEXIS 5 at *4-*5, 2006 WL 2329939. An ALJ may
 4 disregard opinion evidence provided by “other sources,” characterized by the Ninth Circuit as lay
 5 testimony, “if the ALJ ‘gives reasons germane to each witness for doing so.’” Turner, supra, 613
 6 F.3d at 1224 (quoting Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001)); see also Van Nguyen
 7 v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996). This is because in determining whether or not “a
 8 claimant is disabled, an ALJ must consider lay witness testimony concerning a claimant's ability
 9 to work.” Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1053 (9th Cir.
 10 2006) (citing Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993); 20 C.F.R. §§ 404.1513(d)(4)
 11 and (e), 416.913(d)(4) and (e)).

13 Morgan Powell, ARNP, completed a Medical Source Statement regarding plaintiff on
 14 January 24, 2012. AR 445-46. Ms. Powell opined that plaintiff’s impairments would limit her to
 15 standing and walking as well as sitting for less than one hour per day in an eight hour work day.
 16 AR 446. She also opined plaintiff would be limited to occasionally carrying ten pounds and
 17 would never be able to squat or climb. Id. The ALJ gave this opinion little weight “as it is not
 18 supported by the medical record as a whole, and appears at least in part to be based on the
 19 claimant’s subjective complaints.” AR 18. Plaintiff argues these were not legally sufficient
 20 reasons to discredit the opinion. See Dkt. #13, pp. 8. This Court agrees.

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 22 The Ninth Circuit has characterized lay witness testimony as “competent evidence,”
 23 noting that an ALJ may not discredit ‘lay testimony as not supported by medical evidence in the
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 26 ³ “Other sources” specifically delineated in the relevant federal regulations also include “educational personnel,” *see* 20 C.F.R. § 404.1513(d)(2), and public and private “social welfare agency personnel,” *see* 20 C.F.R. § 404.1513(d)(3).

1 record.” Bruce v. Astrue, 557 F.3d 1113, 1116 (9th Cir. 2009) (citing Smolen v. Chater, 80 F.3d
 2 1273, 1289 (9th Cir. 1996)). Similar to the rationale that an ALJ may not discredit a plaintiff’s
 3 testimony as not supported by objective medical evidence once evidence demonstrating an
 4 impairment has been provided, Bunnell v. Sullivan, 947 F.2d 341, 343, 346-47 (9th Cir. 1991)
 5 (en banc) (citing Cotton, supra, 799 F.2d at 1407), but may discredit a plaintiff’s testimony when
 6 it contradicts evidence in the medical record, *see Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th
 7 Cir. 1995); see also Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001); Smolen, supra, 80
 8 F.3d at 1284, an ALJ may discredit lay testimony if it conflicts with medical evidence, even
 9 though it cannot be rejected as unsupported by the medical evidence. See Lewis v. Apfel, 236
 10 F.3d 503, 511 (9th Cir. 2001) (An ALJ may discount lay testimony that “conflicts with medical
 11 evidence”) (citing Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir. 1984); Baylis v. Barnhart,
 12 427 F.3d 1244, 1218 (9th Cir. 2005) (“Inconsistency with medical evidence” is a germane reason
 13 for discrediting lay testimony) (citing Lewis, supra, 236 F.3d at 511); see also Wobbe v. Colvin,
 14 2013 U.S. Dist. LEXIS 111325 at *21 n.4 (D. Or. 2013) (unpublished opinion) (“Bruce stands
 15 for the proposition that an ALJ cannot discount lay testimony regarding a claimant’s symptoms
 16 solely because it is *unsupported* by the medical evidence in the record; it does *not* hold
 17 *inconsistency* with the medical evidence is not a germane reason to reject lay testimony”) (citing
 18 Bruce, supra, 557 F.3d at 1116), adopted by Wobbe v. Colvin, 2013 U.S. Dist. LEXIS 110195 at
 19 *2 (D. Or. 2013) (unpublished opinion). Thus, the ALJ’s finding that Ms. Powell’s opinion was
 20 unsupported by the medical record as a whole was not a germane reason for discrediting Ms.
 21 Powell’s opinion.

25 The ALJ also discredits Ms. Powell’s opinion finding it based in part on plaintiff’s
 26 subjective complaints. AR 18. Defendant correctly points out that “[a] physician’s opinion of

1 disability ‘premised to a large extent upon the claimant’s own accounts of his symptoms and
 2 limitations’ may be disregarded where those complaints have been” discounted properly.
 3 Morgan, supra, 169 F.3d at 602 (quoting Fair v. Bowen, 885 F.2d 597, 605 (9th Cir. 1989)
 4 (citing Brawner v. Sec. HHS, 839 F.2d 432, 433-34 (9th Cir. 1988))). However, like all findings
 5 by the ALJ, a finding that a doctor’s opinion is based largely on a claimant’s own accounts of his
 6 symptoms and limitations must be based on substantial evidence in the record as a whole. See
 7 Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing Tidwell v. Apfel, 161 F.3d
 8 599, 601 (9th Cir. 1999)). Ms. Powell was plaintiff’s primary medical provider and had
 9 evaluated her multiple times prior to rendering her opinion. AR 446, 452, 252-326. Further, Ms.
 10 Powell noted laboratory findings as well as examination findings including atrophy, swelling,
 11 and joint spasms in support of her opinion. AR 445. The ALJ pointed to no support for his
 12 conclusion that the opinion was based to a large extent on subjective statements, and, in fact,
 13 only noted that the opinion appeared “at least in part” based on plaintiff’s subjective complaints.
 14 AR 18. Thus, the ALJ’s conclusion is not supported by substantial evidence and the ALJ failed
 15 to provide legally sufficient reason to discredit Ms. Powell’s opinion.

18 The Ninth Circuit has “recognized that harmless error principles apply in the Social
 19 Security Act context.” Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing Stout v.
 20 Commissioner, Social Security Administration, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting
 21 cases)). The court noted that “in each case we look at the record as a whole to determine [if] the
 22 error alters the outcome of the case.” Molina, supra, 674 F.3d at 1115. The court also noted that
 23 the Ninth Circuit has “adhered to the general principle that an ALJ’s error is harmless where it is
 24 ‘inconsequential to the ultimate nondisability determination.’” Id. (quoting Carmickle v. Comm'r
 25 Soc. Sec. Admin., 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted). The court

1 noted the necessity to follow the rule that courts must review cases ““without regard to errors”
 2 that do not affect the parties’ ‘substantial rights.’” *Id.* at 1118 (*quoting Shinsheki v. Sanders*, 556
 3 U.S. 396, 407 (2009) (*quoting* 28 U.S.C. § 2111) (codification of the harmless error rule)).
 4 Because Ms. Powell’s opinion limited plaintiff to less than full time competitive work, had it
 5 been fully credited, the disability determination would likely change. As such, the ALJ’s error
 6 was not harmless.
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8 II. This Matter Should Be Remanded for Further Administrative Proceedings

9 The Court may remand this case “either for additional evidence and findings or to award
 10 benefits.” *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the
 11 proper course, except in rare circumstances, is to remand to the agency for additional
 12 investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations
 13 omitted). Thus, it is “the unusual case in which it is clear from the record that the claimant is
 14 unable to perform gainful employment in the national economy,” that “remand for an immediate
 15 award of benefits is appropriate.” *Id.*

16 Benefits may be awarded where “the record has been fully developed” and “further
 17 administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at 1292; *Holohan*
 18 *v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
 19 where:

20 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
 21 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
 22 before a determination of disability can be made, and (3) it is clear from the
 23 record that the ALJ would be required to find the claimant disabled were such
 24 evidence credited.

25 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

1 Because issues still remain in regard to the opinion evidence from Morgan Powell ARNP
2 – including whether the ALJ would be required to adopt that evidence and what impact it would
3 have on the ALJ’s assessment of plaintiff’s residual functional capacity and her ability to
4 perform other work existing in significant numbers in the national economy – remand for further
5 consideration of those issues is warranted.
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7 CONCLUSION

8 Based on the foregoing discussion, the undersigned recommends the Court find the ALJ
9 improperly concluded plaintiff was not disabled. Accordingly, the undersigned recommends as
10 well that the Court reverse the ALJ’s decision and remand this matter to defendant for further
11 administrative proceedings in accordance with the findings contained herein.

12 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure (“Fed. R. Civ. P.”)
13 72(b), the parties shall have **fourteen (14) days** from service of this Report and
14 Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file
15 objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn,
16 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk
17 is directed set this matter for consideration on **August 1, 2014**, as noted in the caption.
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19 DATED this 7th day of July, 2014.
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23 Karen L. Strombom
24 United States Magistrate Judge
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